

“USA PATRIOT ACT IMPROVEMENTS ACT OF 2011”
SECTION-BY-SECTION SUMMARY OF S.1125
(HEN11362)

Section 1. Short Title.

This bill is titled the USA PATRIOT Act Improvements Act of 2011.

Section 2. Additional Sunsets.

This section establishes a new sunset of December 31, 2013, on the use of NSLs. This section also changes the sunset dates for provisions under the FISA Amendments Act of 2008 (Pub. L. No. 110-261) from December 31, 2012 to December 31, 2013. This section also makes conforming amendments to FISA and other applicable laws consistent with the sunsets.

Section 3. Orders for Access to Certain Business Records and Tangible Things.

This section modifies the standard for obtaining a court order for tangible things under FISA. Current law requires the Government to submit a statement of facts showing reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation. However, current law states that the tangible things sought are presumptively relevant if the Government shows that they pertain to (a) a foreign power or an agent of a foreign power, (b) the activities of a suspected agent of a foreign power who is the subject of such an authorized investigation, or (c) an individual in contact with, or known to, an agent of a foreign power who is the subject of such authorized investigation. This section removes the presumption of relevance described above. It requires the Government to provide a statement of the facts and circumstances relied upon by the applicant to justify the applicant’s belief that the tangible things sought are relevant. This ensures that the Government is presenting a thorough statement of facts to the court and strengthens judicial oversight. The Department of Justice has indicated that it does not rely on this presumption, and that its current practice is to provide the Foreign Intelligence Surveillance Court with a complete statement of facts to support issuance of an order.

Section 3(a)(2)(A) alters certain requirements with respect to applications made pursuant to 50 U.S.C. 1861. These changes are not intended to affect or restrict any activities approved by the FISA court under existing statutory authorities. Rather, this provision is intended to ensure that in applications made pursuant to 50 U.S.C. 1861, the Government must submit a statement of the facts it relies on to support its belief that the items or information sought are relevant to an authorized investigation and that such relevance is not to be presumed based on the presence of certain factors.

To obtain bookseller records or library records that contain personally identifiable information, the Government must provide a statement of facts showing reasonable grounds to believe the tangible things are relevant to an authorized investigation and pertain to (a) an agent of a foreign

power, (b) the activities of a suspected agent, or (c) an individual in contact with or known to a suspected agent of foreign power subject to the investigation. “Bookseller records” are defined as meaning any transactional records reflecting the purchase or rental of books, journals, or magazines, whether in digital or print form. The Department of Justice has already agreed to implement this requirement administratively.

This section also requires court review of minimization procedures. Finally, this section includes transition procedures to ensure that any order in effect at the time of enactment remains in effect until the expiration of the order.

Section 4. Orders for Pen Registers and Trap and Trace Devices for Foreign Intelligence Purposes.

Under current law, in order to obtain a FISA pen/trap, the Government must certify that the information sought is merely foreign intelligence information or is relevant to an investigation to protect against terrorism. The bill modifies the standard for obtaining a pen/trap to require the Government to provide a statement of the facts and circumstances relied upon by the applicant to justify the applicant’s belief that the information likely to be obtained is relevant. This ensures that the Government is presenting a thorough statement of facts to the court and strengthens judicial oversight.

Section 4(a)(2)(A) alters certain requirements with respect to applications made pursuant to 50 U.S.C. 1842. These changes are not intended to affect or restrict any activities approved by the FISA court under existing statutory authorities. Rather, this provision is intended to ensure that in applications made pursuant to 50 U.S.C. 1842, the Government must submit a statement of the facts it relies on to support its belief that the items or information sought are relevant to an authorized investigation.

This section also requires minimization procedures, which are not required under current law, and makes those procedures subject to court review. Section 4(b) governs procedures for minimization of the retention and dissemination of information obtained pursuant to 50 U.S.C. 1842 where appropriate in exceptional circumstances. This provision is intended to provide a statutory footing for the existing practice whereby specialized minimization procedures are implemented in certain limited circumstances under FISA court authorization and oversight.

Finally, this section includes transition procedures to ensure that any order in effect at the time of enactment remains in effect until the expiration of the order.

Section 5. Limitations on Disclosure of National Security Letters.

This section authorizes the Government to prohibit disclosure of the receipt of an NSL (there are four different statutes that authorize NSLs) where a high level official certifies that disclosure may result in danger to the national security, interference with an investigation, or danger to the life or safety of a person. The FBI has stated that its current practice is to require such a certification to include an appropriately thorough statement of facts setting forth the need for nondisclosure.

The recipient of an NSL nondisclosure order may challenge the nondisclosure at any time by notifying the Government of a desire to not comply. Section 6 (below) details the process for doing so.

Section 6. Judicial Review of FISA Orders and NSL nondisclosure orders.

This section allows the recipient of a section 215 order for tangible things to challenge the order itself and any nondisclosure order associated with it. Current law requires a recipient to wait a year before challenging a nondisclosure order. This section repeals that one-year mandated delay before a recipient of an order for tangible things can challenge such a nondisclosure order in court. It also repeals a provision added to the law in 2006 stating that a conclusive presumption in favor of the Government shall apply where a high level official certifies that disclosure of the order for tangible things would endanger national security or interfere with diplomatic relations.

This section also corrects the constitutional defects in the issuance of nondisclosure orders on NSLs as found by the Second Circuit Court of Appeals in *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008), and adopts the concepts suggested by that court for a constitutionally sound process. *Id.* at 883-84. The bill allows the recipient of an NSL with a nondisclosure order to notify the Government at any time that it wishes to challenge the nondisclosure order. The Government then has 30 days to seek a court order in Federal district court to compel compliance with the nondisclosure order. The court has authority to set the terms of a nondisclosure order as appropriate to the circumstances, but must afford substantial weight to the Government's argument in favor of nondisclosure.

According to current Department of Justice policy, all NSLs must include a notice that informs recipients of the opportunity to contest the nondisclosure requirement through the Government-initiated judicial review. This section states that the government's application for an NSL nondisclosure order may be filed either in the district within which the authorized investigation is conducted or in the jurisdiction where the recipient's business is located. This option will ease the burden on the recipient in challenging the nondisclosure order.

This section requires the Government to notify any entity that challenges a nondisclosure order when the need for nondisclosure is terminated. The Department of Justice agreed to implement this measure administratively in December 2010; therefore, this section will codify current practice.

The bill also requires FISA court approval of minimization procedures in relation to the issuance of a section 215 order for production of tangible things, similar to the court approval required for other FISA authorities such as wiretaps, physical searches, and pen register and trap and trace devices.

Section 7. Certification for Access to Telephone Toll and Transactional Records.

This section codifies current FBI practice in issuing an NSL, and augments oversight and transparency. Current law requires only that an official certify that the information requested in

the NSL is relevant to, or sought for, an authorized investigation to protect against international terrorism or clandestine intelligence activities, or for a law enforcement investigation, counterintelligence inquiry, or security determination. This section adds a requirement that the FBI retain a written statement of specific facts showing that there are reasonable grounds to believe that the information sought is relevant to such an authorized investigation. This statement of specific facts will not be included in the NSL itself, but will be available for internal review and Office of Inspector General audits. The Department of Justice has stated that it is current policy for the FBI to retain a statement of specific facts showing the information sought through NSLs is relevant to an authorized investigation.

Section 8. Public Reporting on National Security Letters.

This section requires reporting of aggregate numbers based upon the total number of all NSLs issued each year, as opposed to by individual NSL. This section ensures that the FBI can keep an accurate record of the information it must disclose by allowing it to report both on persons who are the subject of an authorized national security investigation, and on individuals who have been in contact with or otherwise directly linked to the subject of an authorized national security investigation.

Section 9. Public Reporting on the Foreign Intelligence Surveillance Act.

This section requires that the Government produce an annual unclassified report on how the authorities under FISA are used, including their impact on the privacy of United States persons. This report shall be easily accessible on the Internet.

Section 10. Audits.

This section requires the DOJ Office of Inspector General to conduct audits of the use of three surveillance tools: 1) orders for tangible things under section 215 of the 2001 Patriot Act, or section 501 of FISA; 2) pen registers and trap and trace devices under section 402 of FISA; and 3) the use of NSLs. The audits will cover the years 2007 through 2013. The scope of such audits includes a comprehensive analysis of the effectiveness and use of the investigative authorities provided to the Government, including any improper or illegal use of such authorities. This section also requires the Inspectors General of the Intelligence Community to submit separate reports that also review these three provisions. The audits covering the years 2007-2009 must be completed by March 31, 2012. The audits for the years 2010-2011 must be completed by March, 31, 2013. The audits for the years 2012-2013 must be completed by March, 31, 2015. These due dates ensure that Congress will have time to fully consider the findings of the audits prior to the June 1, 2015 sunsets in the underlying bill.

Section 11. Delayed Notice Search Warrants.

Current law requires notification of a delayed notice search warrant within 30 days. This section requires notification of a delayed notice search warrant within seven days, or a longer period if justified.

Section 12. NSL Procedures.

Current law does not require minimization procedures be established, but on October 1, 2010, the Attorney General adopted procedures concerning the collection, use, and storage of information obtained in response to NSLs. This section requires that the Attorney General, periodically review, and revise as necessary, those procedures, and to give due consideration to the privacy interests of individuals and the need to protect national security. If the Attorney General makes any significant changes to these NSL procedures, the Attorney General is required under this section to notify Congress, and to submit a copy of the changes.

Section 13. Severability.

This section includes a severability clause that will ensure that in the event any part of the bill or any amendment to the bill is found to be unconstitutional the remainder of the bill will not be affected.

Section 14. Offset.

This section includes a \$9,000,000 offset from the Department of Justice Assets Forfeiture Fund for any direct spending that could be incurred by the provisions of the bill.

Section 15. Electronic Surveillance

This section is intended to amend the FISA wiretap statute (50 U.S.C. 1805(c)(1)(A)) so as to require law enforcement to identify “with particularity” the target of a wiretap request under FISA. The Department of Justice has testified that, in applications to the FISA court for “roving” wiretaps, it must provide the court sufficient detail to identify the target with particularity.

Section 16. Effective Date.

This section includes an effective date of 120 days from the date of enactment for the statutory revisions made by this legislation to take effect. This period of time will provide the Government an appropriate amount of time to implement the new procedures required by the legislation.